Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

MICHAEL A. THOMAS, *PRO SE*,
Petitioner,

v.

JOHN E. POTTER, Postmaster General,
United States Postal Service,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL A. THOMAS
Pro Se
17421 LOOMIS STREET
EAST HAZEL CREST, IL 60429
(708) 705-4407

May 11, 2007

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

1. Petitioner presented and cited a conflicting decision between U.S. Court of Appeals for the 7th Circuit and the Supreme Court of the United States, of the two courts which court decision is controlling?

2. Does falsification of the plaintiff's personnel records, as well as failure to comply with the terms of the EEO Settlement Agreement, demonstrate deliberate retaliation of the defendant against the plaintiff?

3. Does denial of plaintiff's seniority rights qualify as an adverse employment action?

4. Whether the Respondent falsification of Official Personnel Records in order to change the Petitioner's shift a violation to, or conflict with the 7th Circuit ruling of *Aviles v. Cornell Forge Co.*, 241 F.3d 589, 593 (7th Cir. 2001)?

5. Should the U.S. Court of Appeals for the 7th Circuit comply with Title VII, *EEOC Compliance Manual Section 2*; (Threshold issues)?

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The Seventh Circuit Court of Appeals issued its unpublished order on October 11, 2006. *See* Appendix B. The Seventh Circuit Court of Appeals denied rehearing en banc on December 14, 2006. *See* Appendix A. The District Court. issued judgment on December 20, 2004. *See* Appendix C.

JURISDICTION

On October 11, 2006 The U.S. Court of Appeals for the Seventh Circuit upheld and affirmed the District Court decision. A timely petition for rehearing was denied by U.S. Court of Appeals on December 14, 2006, and a copy the order denying rehearing appears at Appendix A. This court has instant Jurisdiction, pursuant to 28 U.S.C. 1254(1) to review the final decision from the U.S. Court of Appeals.

STATUTORY PROVISION INVOLVED

The statutory provision involved is Title VII. The Petitioner asserts Respondent has violated Title VII through its acts of gender discrimination and retaliation.

STATEMENT OF THE CASE

This case presents five important questions regarding actionable adverse employment action. First, The U.S. Court of Appeals for the 7th Circuit decision, conflicts with a decision of the Supreme Court of the United States, in ignoring Thomas' (Petitioner) relevant facts, in *Burlington N. & Santa Fe R.R. Co. v, White*, 548 U.S. ___ (2006), U.S. Supreme Court Justice Breyer put it, "the significance of any given act of retaliation will often depend upon the particular circumstances, **Context matters**". Second, the Respondent (Defendant) falsified Official Personnel Records, enclosed as exhibit #2 and exhibit #4 is Thomas' direct evidence to support this claim. Third, Due to the falsification of these records the Respondent has ultimately caused a disregard for Thomas' seniority. Thomas seniority is essential and has an exchangeable value; to disregard Thomas seniority would certainly have a material adverse affect. In addition, because of the falsification of these records have certainly altered the terms and conditions of Thomas' employment to the extents of denial of Equal Employment Opportunities. Fourth, The Seventh Circuit is in conflict with it own precedent, whereas the Seventh Circuit ruled that filing a false report would violate the retaliation provision. However inasmuch to this ruling the Respondent falsified Official Personnel Records. Fifth, the Seventh Circuit is in conflict with Title VII, *EEOC Compliance Manual Section 2*; (Threshold issues).

Factual Background

On December 5, 1994, an EEO Settlement Agreement between Thomas and the defendant came into effect (exhibit #1). The terms of this settlement required that Thomas was to be placed into an assigned position, Tools & Parts Clerk (now named "Maintenance Support Clerk") within 30 days of this

settlement. The defendant failed to adhere to this requirement, instead issuing a Personnel Action, PS Form 50 (exhibit #2) 18 months later, with an effective date of May 25, 1996, featuring language inconsistent with the EEO settlement terms.

On May 20, 2002, Thomas filed the instant suit, alleging gender discrimination and retaliation in violation of Title VII. The Respondent Motion for Summary Judgment was based on an insufficient demonstration of harm, which is contrary to the text as well as the goals and purposes of Title VII.

Thomas' was discriminated against by reason of gender, when the Respondent failed to affect female employees within the same competitive level who are junior to him (less Maintenance Craft Seniority).

Pursuant to the National Agreement between the United States Postal Service and the American Postal Workers Union (APWU) requires that a bidding process shall be conducted prior to any assignments. The Respondent failed to grant or accomodate Thomas his preference pursuant to both the established National Agreement, and the Memorandum of Understanding (MOU) of January 5, 1996.

Pursuant to the Official Notice of Assignment exhibit #4, Thomas was wrongfully reassigned to a different shift via the Respondent falsifying this Official Personnel Record (an adverse employment action). **Exhibit #4** reflects that a bidding process was conducted, dated October 12, 1996, as oppose to the **5th question and answer of exhibit #5** reflects that there was no bidding process conducted during time period of January 1996 through February 1997. Please notice that the signatory for both exhibit #4 and exhibit #5 are the same.

After disregarding the terms of the EEO Settlement Agreement (1994), the defendant made fraudulent changes to Thomas' official personnel records (exhibits #2, and #4), linking this entire claim to Thomas' 1994 protected activity. In *Aviles v. Cornell Forge Co.*, 241 F.3d 589, 593 (7th Cir. 2001), the 7th Circuit court ruled that "filing false report would violate the retaliation provision. Inasmuch to this ruling, on June 3, 1996, the defendant issued a PS Form 50 stating that "In accordance with grievance settlement l-J-1159-93, seniority will be 10-03-92 as unassigned regular," even though this was inconsistent with the language of the EEO Settlement Agreement. This personnel action form, in combination with the falsification of Thomas' personnel records, changed the terms of the EEO Settlement Agreement and resulted in Thomas being classified as **an unassigned regular**.

"Unassigned Regular" is defined by the U.S. Postal Service as "employees whose positions have been abolished." By abolishing Thomas' position, his occupational seniority was eliminated, therefore causing a **tangible change** in the condition that produced a material employment disadvantage for his employment (movement to an undesirable shift). Despite Thomas' protests in regard to the actual terms of the EEO Settlement Agreement, the defendant took no corrective action. Thomas' change in classification to an unassigned regular allowed the defendant to move Thomas to an undesirable shift (tour). This adverse action, a direct violation of the EEO Settlement Agreement (exhibit #1) and falsification of Thomas' personnel records (exhibit #2, and #4) demonstrate the defendant's deliberate retaliation against Thomas.

Exhibit #3, the Memorandum of Understanding (MOU), is an "'agreement entered into between the American Postal

Workers Union (APWU), Chicago Local and the U.S. Postal Service to facilitate the placement of maintenance craft employees in the Chicago Center Processing & Distribution Center." The MOU does not segregate by or into occupational groups, such as Maintenance Mechanics or Maintenance Support Clerks, but applies to all Maintenance employees. Upon its implementation, it is required to be available to all Maintenance employees in the same manner as the APWU National Agreement.

To properly change an unassigned employee shift (tour), the MOU (exhibit #3) provides "employees will be allowed to exercise their preference for work schedule by craft seniority." which is referred to as the **bidding process**. Also, Section 2D of the MOU states that "positions not directly matched to established positions ... will be posted for bid." On October 12, 1996, the defendant issued Thomas a Notice of Assignment (exhibit 4), stating "Official personnel records indicate you failed to receive a position during the bidding process." However, since there had been no bidding process, as evidenced by Defendant Admission (exhibit #5), the Defendant failed to adhere to the MOU (exhibit #3).

On July 8, 1997, Thomas made a formal request (exhibit #6) to exercise his preference for work schedule by **craft seniority** in accordance with the MOU (exhibit #3), which was denied. However, Section 2D of the MOU states that the option of preference will be given to employees based on **craft seniority**. Even though Thomas' reclassification eliminated his occupational seniority, the MOU (which is the only established provision available to the defendant to be used to assign unassigned Maintenance employees) calls for the use of **craft seniority**, which is superior to occupational seniority. Therefore, when Section 2D was violated, it enabled the defendant to assign Thomas, who had craft

seniority, to a different shift (tour), while allowing the five women in his same competitive work level to retain their shift (tour).

REASONS FOR GRANTING THE PETITION

In *Washington v. Ill. Dept. of Revenue*, 420 F.3d 658 (7th Cir. 2005) states "changes in work hours will normally not sustain a retaliation claim." Even though the term "normally" leaves some room for interpretation, the notion that the defendant's adverse actions against Thomas consisted of a mere shift change serves to mischaracterize the facts as immaterial.

In the Defendant Circuit Rule 54 Statement holds that the actions taken against the Plaintiff do not qualify as "materially adverse" in regards to his claim of discrimination. While in *Washington v. Ill. Dept. Of Revenue*, 420 F.3d 658 (7th Cir. 2005) states "material is one of those protean words that resist further definition. This holds open some potential to say that an act that would be immaterial in some situations is material in others". The point is that only a careful sifting of the facts will determine what constitute adverse employment action, even where economic factors and title remain the same.

Per *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), a "disputed issue of fact is 'genuine' if the evidence is such that a reasonable fact finder could find in favor of the non-moving party ... A fact is 'material' if it has the potential to affect the outcome of the case." The falsification of official personnel records (by the defendant) is a fact that has the potential to affect the outcome of this particular case, and so should be considered material. Through preponderance of evidence (enclosed) and in according to the facts in these exhibits, it's clear that the defendant engaged in actions of Retaliatory

Discrimination through its 1) Disregard for Thomas' EEO Settlement Agreement, 2) Falsification of Thomas' official personnel records, 3) Disregard for the established MOU, and 4) Denial of Thomas' seniority rights.

In *Washington v. Ill. Dept. Of Revenue*, 420 F.3d 658 (7th Cir. 2005) a case decided by the 7th Circuit court allowed for an exception acknowledging the fact that Washington employer exploited her vulnerability, and the fact that she had to used her leave (a benefit of employment) in order to care for her son who had Downs syndrome. Comparing this case to the outcome/decision of *Washington*, the Petitioner requests this court to consider that denying Thomas of his seniority rights (a benefit of employment) is a denial of employment benefit (material adverse action). Consider On October 12, 1996 the Defendant issued Thomas a Notice of Assignment (exhibit 4), despite this falsified, improper notice, the Defendant exploited Thomas vulnerability when the Defendant knew that Thomas had no other choice but to obey the Notice of Assignment or risk losing job for insubordination, or failure to report to assigned shift (tour).

Per *Joseph W. Milder, v. Dept of Veteran Affairs*, EEOC Appeal No. 01A11753 (August 1, 2002): states "Clearly, seniority rights are a benefit of employment." Also, the Remedial Action contained in *Lisa H. Selby v. United States Postal Service*, EEOC Request No. 05A00046 (November 29, 2000), the EEOC ordered the defendant to "provide complainant with back pay... and all other attendant employment benefits (including seniority rights)." These two rulings clearly define seniority rights as a benefit of employment. Therefore, when this benefit (seniority rights) is denied to an employee, the result has an adverse affect which is material.

Another instance that demonstrates the material nature of the defendant's actions has to do with discrimination. *Per Washington v. Ill. Dept. Of Revenue*, 420 .F.3d 658 (7th Cir. 2005), "'discrimination' entails a requirement that the employer's challenged action would have been material to a reasonable employee, which means that the same requirement applies to §2000e-3(a), the anti-retaliation clause, as well as other provisions in Title VII that use the word 'discrimination'."

Whereas, if falsification of records denied Thomas his seniority rights, if seniority rights by definition are a benefit of employment, and if a reasonable person would consider denial of seniority benefits to be "material" then the defendant's challenged action in this case should be evaluated in terms of Retaliatory Discrimination.

1. With the help of **exhibit #2** and **exhibit #4**, clearly demonstrates that the shift change resulted from the falsification of the Official Notice of Assignment exhibit #4, which could certainly be construed by fact-finders as a discriminatory, retaliatory, and as an actionable adverse employment action. *In Aviles v. Cornell Forge Co.*, 241 F.3d 589, 593 (7th Cir. 2001), the 7th Circuit ruled that filing a false report would violate the retaliation provision. However inasmuch to this ruling the Respondent falsified Official Personnel Records.

2. Based on the facts, this case is not predicated on a mere schedule change, but includes disregard for the EEO Settlement Agreement, falsification of official personnel records, disregard for the established MOU exhibit #3, denial of Thomas' seniority rights (a material adverse employment action), and are collectively acts of Retaliatory Discrimination, which falls under the anti-

discrimination clause Title of the Civil Rights Act. Thereby the Defendant actions do not rise to the level of a legitimate non-discriminatory business decision, and summary judgment is inappropriate.

3. In ***Meritor Savings Bank v. Vinson,*** 477 U.S. 57 (1986), the U.S. Supreme Court rejected the notion that Title VII only applied to economic or tangible barriers. The Court stated that "*the language of Title VII is not limited to economic or tangible discrimination.*" Only a careful sifting of the facts will determine what constitute adverse employment action, even where economic factors and title remain the same.

4. Pursuant to the *EEOC Compliance Manual Section 2*; (Threshold Issues) Title VII prohibits discrimination related to job decision, employment practices, or other terms, condition, or privileges of employment based on an individual's protected status. A specific issue of this type that a charging party may raise includes, but is *not limited to*, is an undesirable reassignment.

5. It apparently clear that the Supreme Court of the United States ruling in the *Meritor Saving Bank v. Vinson* case is in compliance with Title VII, and the *EEOC Compliance Manual Section 2.*; (Threshold Issues) .

CONCLUSION

For the following reasons, this court should vacate the U.S. Court of Appeals for the Seventh Circuit decision and grant the petition for a writ of certiorari.

1. Because the U.S. Court of Appeals for the 7th Circuit decision, conflicts with a decision of the Supreme Court of the United States.

2. Because the U.S. Court of Appeals for the 7th Circuit decision is not in compliance with Title VII, *EEOC Compliance Manual Section 2*; (Threshold issues).

3. If the decision of the Seventh Circuit is allowed then the precedent of this court, and Title VII, *EEOC Compliance Manual Section 2*; (Threshold issues) serves no purpose.

For the foregoing reasons, this court should remand this case to the United States District Court for the Northern District of Illinois, Eastern Division for trial on the merits.

Respectfully submitted,

Michael A. Thomas
Pro Se Litigant
17421 Loomis Street
East Hazel Crest, IL 60429
(708) 705-4407